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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LILLIAN EUGENIO YBONA,

Defendant and Appellant.

A154535

(San Mateo County
Super. Ct. No. 18-NF-001967-A)

Lillian Ybona appeals from a judgment entered after she pleaded no contest to two counts of identity theft (Pen. Code § 530.5, subd. (a))¹ and the trial court sentenced her to a four-year prison term. Ybona’s appellate counsel has filed a brief that raises no issue for appeal and asks this court for an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Having conducted that review, we affirm the judgment as modified to correct an error in sentencing.

I. FACTS AND PROCEDURAL HISTORY

A. Background

The present appeal involves three criminal cases that were filed against Ybona in San Mateo County.

1. Case No. 18NF001884 (the identity theft case)

On February 16, 2018, the San Mateo County District Attorney filed a felony complaint charging Ybona with committing ten offenses on January 17, 2018: five

¹ Statutory references are to the Penal Code unless otherwise indicated.

counts of second-degree commercial burglary (§ 460, subd. (b)); and five counts of identity theft (§ 530.5, subd (a)). All offenses involved a single victim, a woman to whom we refer as S.C.

A preliminary hearing was held on March 5, 2018. The court granted the prosecutor's motion to dismiss the count nine charge of commercial burglary for insufficient evidence. Then the prosecutor presented evidence of the following facts: On January 17, 2018, S.C. notified the police that her debit card, two of her credit cards and some jewelry were missing from her car. The police conducted an investigation and determined that S.C.'s debit and credit cards had been used to make five unauthorized transactions. The police secured videotape recordings and other evidence, which showed that Ybona used S.C.'s credit cards to purchase items at various locations including a 7-Eleven, a Starbucks, and a Lowe's store. When Ybona was interviewed by police, she initially denied making the transactions. Subsequently, she stated that she had purchased a credit card from a homeless person, which she used to purchase items at Starbucks.

After the People presented their evidence, defense counsel made two arguments. First, counsel challenged the sufficiency of the evidence as to some charges. The prosecutor responded that all counts were supported by evidence, although some of it was circumstantial. The trial court agreed with the prosecutor and found probable cause to believe the crimes were committed.

Defense counsel characterized his second argument as a "Prop 47-type" issue and questioned whether the charges should have been misdemeanors rather than felonies. Counsel argued that normally a commercial burglary involving less than \$950 is a misdemeanor and that there was "a split in case law" as to whether attaching the burglary to an identity theft charge under section 530.5 meant that Proposition 47 no longer applied. Counsel also acknowledged that Ybona had a "long" criminal record and was currently on post-release community supervision for a felony, which could affect her right to a "reduction" under Proposition 47. The prosecutor argued that in light of the split in authority, there was no iron-clad rule precluding him from charging the crimes as felonies and that the dollar amount should not be dispositive when the crimes involved

the theft of the personal identification information of another person. The court concluded that in light of the evidence that there were five transactions within a very short period of time using somebody else's credit cards, the felony charges would be allowed to stand even though the purchases were not substantial in amount.

2. Case No. 18NF001967 (the stolen property case)

On February 21, 2018, the San Mateo County District Attorney filed a felony complaint, which charged Ybona with committing two offenses on October 19, 2017. Count one charged Ybona with the felony of receiving stolen property (an automobile), with a special allegation that she suffered two prior auto theft convictions. (§ 496d, subd. (a); § 666.5.) Count two charged Ybona with misdemeanor possession of burglary tools. (§ 466.)

On March 5, 2018, the trial court conducted a preliminary hearing. The court granted the prosecutor's motion to dismiss the misdemeanor charge of possessing burglary tools in the interests of justice. Then the prosecution presented evidence of the following facts: On the morning of October 19, 2017, a deputy sheriff detained Ybona after she pulled into a gas station driving a car that had been reported stolen. The officer noticed markings and scratches on the ignition device of the car and a screwdriver on the floorboard, which he was able to use to start the car. Ybona admitted to the officer that she knew the car could have been stolen. The officer conducted an investigation to determine the value of the car, which showed that it had a value of \$1,675.

The prosecution also presented certified records of Ybona's prior criminal convictions, which were admitted into evidence. Then the court found that, based on the evidence admitted, there was reasonable and probable cause to conclude that Ybona was guilty of violating section 496d, subdivision (a) when she had a prior auto theft conviction.

3. Case No. 16NF013637 (the auto theft case)

On February 27, 2018, the San Mateo County Probation Department filed a petition for revocation of Post Release Community Supervision (PRCS). According to the petition, in February 2017, Ybona was convicted of unlawful taking of a vehicle

without the consent of the owner (Veh. Code § 10851, subd. (a)). She was sentenced to a 564-day prison term and was released on PRCS in September 2017.

In the petition, the Probation Department alleged that Ybona violated the terms of her PRCS by engaging in conduct prohibited by law and by failing to follow all instructions of her probation officer. The alleged legal violations included the charges against Ybona in the identity theft case and the stolen property case outlined above.

B. The March 2018 Information and Ybona's Initial Pleas

On March 16, 2018, the San Mateo County District Attorney filed an information in case no. 18NF001967, Ybona's stolen property case, which incorporated charges from case no. 18NF001884, Ybona's identity theft case.

The March 2018 information charged Ybona with four counts of commercial burglary (§ 460, subd. (b)), five counts of identity theft (§ 530.5, subd. (a)), and one count of receiving stolen property (§ 496d, subd. (a)). The information also contained 14 separate special allegations of prior felony convictions, including prior convictions for automobile theft and for a serious and/or violent felony under the Three Strikes Law (§ 667, subd. (d), § 1170.12, subd. (b)).

On March 20, 2018, Ybona waived arraignment on the information, entered not guilty pleas to all charges, and denied all special allegations. After the defense declined to waive time, a pre-trial conference was set for April 3 and a jury trial was scheduled for April 30, 2018.

C. The Negotiated Pleas and Sentence

At an April 3, 2018 hearing, the defense submitted a change of plea form completed by Ybona. The trial court conducted an inquiry to determine whether Ybona understood her rights and voluntarily waived them. Ybona confirmed statements on her change of plea form, including that she had been promised that she would receive a four-year prison sentence in exchange for her pleas of guilty or no contest. Ybona stated no other promises had been made to her, and that she did not have any questions. She confirmed her signature on her change of plea form and also confirmed that she had

waived each of the rights provided for on that form. Defense counsel joined in the waiver.

Then the court filed the change of plea form and Ybona entered pleas of no contest to two counts of felony identity theft in violation of section 530.5, subdivision (a). Ybona then admitted an amended special allegation that, prior to committing the two identity theft offenses, she was convicted of violating section 460, subdivision (a) [first degree burglary], which constituted a serious and/or violent felony and qualified as a strike under the Three Strikes law. The defense stipulated there was a factual basis for Ybona's pleas and admission.

The trial court found that Ybona's pleas and admissions were freely, knowingly and voluntarily made, and accepted them as true. Accordingly, the court found Ybona guilty of the two felony charges and that the prior strike allegation was true.

At the April 3 hearing, the trial court also announced Ybona's sentence. Following an off-the-record discussion, the prosecution and defense stipulated that Ybona's two offenses were part of the same transaction and occurrence and thus did not warrant consecutive sentences. The trial court accepted that stipulation, and then stated that Ybona would be sentenced to a total term of four years in prison, computed as follows: For count two, the court imposed a midterm of two years, which was doubled because of the prior strike, for a total of four years. For count four, "because of the stipulation," the court imposed an identical four-year term, that would "run concurrent with the sentence imposed on count [two], for a total commitment of four years."

The court inquired about time credits and was advised by the probation officer and defense counsel that some of Ybona's actual time was being credited to another case and thus she was given actual time credit of 30 days plus 30 days of work time for a total of 60 days credit. The court also imposed fines and fees without objection. Ybona and her counsel agreed that dismissed counts could be considered for purposes of restitution and then the prosecutor moved to dismiss the remaining charges and special allegations pursuant to the negotiated plea. The court granted that motion.

The trial court also addressed the pending petition charging Ybona with violating PRCS. Ybona waived her right to a hearing on the violation. Defense counsel joined in the waiver. Then Ybona admitted that she violated PRCS by committing one of the identity theft felonies that was the subject of her plea deal. Again defense counsel stipulated there was a factual basis for the admission. Accordingly, the court found that Ybona violated PRCS, revoked her grant of PRCS and found that PRCS was terminated as unsuccessful. Ybona was credited 47 actual days plus 46 additional days for the PRCS violation.

D. The Present Appeal

On June 5, 2019, Ybona filed two notices of appeal, one dated May 26, 2018 and the other dated May 31, 2018. Both notices contained requests for a certificate of probable cause, which were not granted.

Ybona's appointed appellate counsel filed a *Wende* brief, which does not draw our attention to any issues pursuant to the procedure authorized by *Anders v. California* (1967) 386 U.S. 738, 744. Appellate counsel attested that he appraised Ybona of her rights to file a supplemental brief and to request to have counsel relieved. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110 [appellate court must address issues raised personally by appellant in *Wende* proceeding].) Ybona did neither.

II. DISCUSSION

Following *Wende* guidelines, we have conducted an independent review of the record summarized above. We have found no errors, with the exception of a minor error in sentencing.

Preliminarily, we note that there is disagreement among intermediate appellate courts in this state about whether the commission of an identity theft in violation of section 530.5, subdivision (a) must be treated as a misdemeanor when the value of personal identifying information the defendant obtained or used did not exceed \$950. (See *People v. Chatman* (2019) 33 Cal.App.5th 60 [collecting cases].) The record shows that the parties and court were aware that this issue was potentially relevant to the disposition of this case. Nevertheless, Ybona elected to enter pleas of no contest to two

felony violations of section 530.5, subdivision (a). The record summarized above shows that Ybona's pleas were knowing and voluntary. Moreover, there was a sound tactical reason for defense counsel to support the negotiated pleas because they resulted in the dismissal of other potentially more serious charges and special allegations, including: a charge that Ybona committed a felony violation of section 496d, subdivision (a) by receiving a stolen automobile, which was supported by evidence that the value of the property exceeded \$1,000; and a special allegation that when Ybona violated section 496d, she had already suffered a prior auto theft conviction, exposing her to a higher sentence as well as a significant (\$10,000) fine under section 666.5.

Turning to the sentencing issue, the trial court ordered Ybona to serve concurrent four-year terms for the two identity theft offenses for which she entered no contest pleas. The court imposed that sentence after accepting the parties' stipulation that the two offenses alleged in count two and count four respectively occurred during the same transaction and occurrence. Under these circumstances, section 654 applies because the undisputed record establishes that the two identity theft convictions were parts of a single transaction and, to the extent that offenses are all part of a single criminal transaction, section 654 bars multiple sentences. (*People v. Hooper* (1967) 250 Cal.App.2d 118, 121.) Furthermore, when section 654 applies to a particular count, "the trial court must impose sentence on that count and then stay execution of that sentence." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1466.) Thus, the trial court erred by ordering Ybona to serve a concurrent term for the second identity theft offense (count four) instead of staying that term pursuant to section 654.

III. DISPOSITION

The judgment is ordered modified to reflect that the count four sentence for violating section 530.5, subdivision (a) is stayed pursuant to section 654. As so modified, the judgment is affirmed. The superior court is ordered to send a certified copy of the corrected abstract of judgment to the Department of Corrections.

TUCHER, J.

WE CONCUR:

POLLAK, P. J.

BROWN, J.